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Nos. 05-908 & 05-915

In the Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,

Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF FOR THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS AND THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Constitution bars a local school board from determining voluntarily that its educational purposes will be accomplished best by educating schoolchildren in a racially diverse environment and that to achieve that goal it is necessary to use race as a factor in assigning children among the school district's elementary and secondary schools – even though the school district demonstrates that its approach is narrowly tailored to accomplish its purpose.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGMENT 2

ARGUMENT 4

THE CONSTITUTION PERMITS LOCAL SCHOOL BOARDS VOLUNTARILY TO ADOPT NARROWLY TAILORED MEASURES TO DESEGREGATE OR PREVENT RESEGREGATION OF PUBLIC SCHOOLS. 4

A. Educating Children In A Racially Diverse Environment Is A Compelling Governmental Interest. 4

1. This Court Has Recognized A Compelling State Interest In Providing Schoolchildren With A Diverse Educational Environment, And The Courts Of Appeals Unanimously Agree. 6

2. Petitioners' Argument Leads To The Absurd Result That A School Board That Wishes To Retain Some Or All Of The Race-Based Measures Used To Achieve Unitary Status May Do So Only If It Remains Under Federal Court Supervision. 8

3. Congress Has Long Recognized The Compelling Interest In Educating Children In Desegregated Schools. 11

TABLE OF CONTENTS—continued

Page

4. Desegregation Of Elementary And Secondary Schools Serves The Compelling National Interest In Fostering National Unity And Effective Participation Of All Citizens In The Civic Life Of The Nation As Well As Preparing Schoolchildren To Participate In Today's Diverse Business Environment. 14

B. The Challenged Voluntary Measures Are Narrowly Tailored To Achieve This Compelling Interest. 18

1. Individual Holistic Assessments Are Not Required Or Even Appropriate To Satisfy Narrow Tailoring In The K-12 Context; A Local School Board Must Prove That Race Is Not Used Unnecessarily In The Government Decisionmaking. 20

2. The Narrow-Tailoring Test Must Be Applied In A Manner That Preserves The Discretion This Court Affords To Local School Authorities In Implementing Educational Goals 23

3. The Seattle Provisions. 25

4. The Louisville Provisions 29

CONCLUSION 30

TABLE OF AUTHORITIES—continued

Page(s)

San Antonio Indep. Sch. Dist. v. *Rodriguez*, 411 U.S. 1 (1973) 23, 24

Spangler v. *Pasadena City Bd. of Educ.*, 611 F.2d 1239 (9th Cir. 1979) 7

Swann v. *Bd. of Educ.*, 402 U.S. 1 (1971) ..... *passim*

United States v. *Paradise*, 480 U.S. 149 (1987) 22

United States v. *Swift & Co.*, 286 U.S. 106 (1932) 9

Vernonia Sch. Dist. No. 47J v. *Acton*, 515 U.S. 646 (1995) 23

Washington v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) 3, 7, 14

Statutes:

20 U.S.C. § 7231 ..... 3, 12

20 U.S.C. § 7231c 12

20 U.S.C. § 7231d 12

20 U.S.C. § 7231i 12

H.R. Rep. No. 92-576 (1971) 13

Emergency School Aid Act of 1972, Pub. L. No. 92-318, Title VII, §§ 701-720, 86 Stat. 354 12-13

Magnet Schools Assistance Program, Pub. L. No. 98-377, 98 Stat. 1299 (1984) 13

Miscellaneous:

Jomills Henry Braddock II & Marvin P. Dawkins, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394 (1994) 16

TABLE OF AUTHORITIES

Page(s)

Cases:

Bazemore v. *Friday*, 478 U.S. 385 (1986) 21

Bd. of Educ. v. *Dowell*, 498 U.S. 237 (1991) 9

Bethel Sch. Dist. No. 403 v. *Fraser*, 478 U.S. 675 (1986) 23

Brewer v. *W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000). 8

Brown v. *Bd. of Educ.*, 347 U.S. 483 (1954) 1, 2

Bustop, Inc. v. *Bd. of Educ.*, 439 U.S. 1380 (1978) 6

Comfort v. *Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005) 6, 8, 19

F[illegible]man v. *Pitts*, 503 U.S. 467 (1992) 8, 9

G[illegible]s v. *Lopez*, 419 U.S. 565 (1975) 23

Green v. *Sch. Bd.*, 391 U.S. 430 (1968) 9

Grutter v. *Bollinger*, 539 U.S. 306 (2003) ... 14-15, 20, 22, 28

Hazelwood Sch. Dist. v. *Kuhlmeier*, 484 U.S. 260 (1988) 23

Johnson v. *Bd. of Educ.*, 604 F.2d 504 (7th Cir. 1979) 7

Keyes v. *Sch. Dist. No. 1*, 413 U.S. 189 (1973) 7

McDaniel v. *Barresi*, 402 U.S. 39 (1971) 6

Milliken v. *Bradley*, 418 U.S. 717 (1974) 23

N.J. v. *T.L.O.*, 469 U.S. 325 (1985) 23

Parent Ass'n of Andrew Jackson High Sch. v. *Ambach*, 598 F.2d 705 (2d Cir. 1979) 7

Regents of the Univ. of Cal. v. *Bakke*, 438 U.S. 265 (1978) 21

Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) 22

TABLE OF AUTHORITIES—continued

Page(s)

Jomills Henry Braddock II, Marvin P. Dawkins & William T. Trent, *The Effects of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT'L J. CONTEMP. SOC. 273 (1994) 16

Jomills Henry Braddock II & James M. McPartland, *The Social and Academic Consequences of School Desegregation*, EQUITY & CHOICES (1988) 16

THOMAS COOK ET AL., SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT (1984) 18

EFFECTIVE SCHOOL DESEGREGATION: EQUALITY, QUALITY AND FEASIBILITY (W.D. Hawley ed. 1981) 17

Maureen T. Hallinan & Stevens S. Smith, *The Effects of Classroom Racial Composition on Students' Interracial Friendliness*, 48 SOC. PSYCHOL. Q. 3 (1985) 16

Eric A. Hanushek, John F. Kain, & Steven G. Rivkin, *New Evidence About Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement*, Nat'l Bureau on Econ. Res., Working Paper No. 8741 (2002) 17

Catherine Horn & Michal Kurlaender, *The End of* Keyes*—Resegregation Trends and Public Schools*, Harvard Civil Rights Project (2006), available at http://www.piton.org/Admin/Article/-Full%20Harvard%20study%20part%202.pdf 17

TABLE OF AUTHORITIES—continued

Page(s)

Michal Kurlaender & John Yun, *Is Diversity a Compelling Educational Interest? Evidence from Metropolitan Louisville*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Orfield & Kurlaender eds. 2001) 16

Goodwin Liu & William L. Taylor, School Choice to Achieve Desegregation, 74 FORDHAM L. REV. 791 (2005) 18

NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, THREE NATIONAL ASSESSMENTS OF READING CHANGES IN PERFORMANCE, 1970-1980 (1981) 18

Gary Orfield & Chung Mei Lee, *Racial Transformation and the Changing Nature of Segregation*, Harvard Civil Rights Project (2006), available at http://www.civilrightsproject.harvard.edu/-research/deseg/Racial_Transformation.pdf 17

Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Orfield & Kurlaender eds. 2001) 17

CHARLES E. SILBERMAN, CRISIS IN THE CLASSROOM (1971) 15

Marshall S. Smith & Jennifer O'Day, *Educational Equality: 1966 and Now*, in SPHERES OF JUSTICE IN EDUCATION: THE 1990 AMERICAN EDUCATION FINANCE YEARBOOK (Verstegen & Ward eds. 1991) 18

WALTER G. STEPHAN, BLACKS AND BROWNS: THE EFFECTS OF SCHOOL DESEGREGATION ON BLACK STUDENTS (1984) 18

TABLE OF AUTHORITIES—continued

Page(s)

William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. NEGRO EDUC. 255 (1997) 16

Amy Stuart Wells et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* (Apr. 2004), http://cms.tc.columbia.edu/i/a/782_ASWells041504.pdf 15

Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531 (1994) 17

AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS (1997) 18

INTEREST OF THE AMICI CURIAE[1]

The Leadership Conference on Civil Rights ("LCCR") is a coalition of more than 180 national organizations committed to the protection of civil and human rights in the United States. It is the Nation's oldest, largest, and most diverse civil and human rights coalition. LCCR was founded in 1950 by three legendary leaders of the civil rights movement – A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the NAACP; and Arnold Aronson, of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races and ethnicities. Member organizations of the Leadership Conference and officers of the LCCR have played a major role in school desegregation litigation and the implementation of court orders since this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).[2]

The Leadership Conference on Civil Rights Education Fund ("LCCREF") is the research, education, and communications arm of LCCR. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation and fostering better public understanding of issues of prejudice.

LCCR and LCCREF strongly support the ability of local school boards to choose to educate children in a diverse environment by voluntarily using race as one factor in the assignment of children to primary and secondary schools. Based on their decades of experience in civil rights issues,

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[1] The parties have consented to the filing of this brief; their written consents have been filed with the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the amici curiae, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

[2] The full list of LCCR member organizations is set forth in the appendix to this brief.

LCCR and LCCREF believe that experiencing diversity in these early years is the best way to equip a child to participate fully in the civic life of our diverse communities and of our diverse Nation, as well as in our country's diverse workplaces. Local school boards are well situated to determine when the use of race-conscious measures is necessary to achieve these goals. When their voluntary decisions to use such measures are narrowly tailored to those important ends, they should be upheld by the courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions in *Brown* and its progeny blazed the path that led our Nation away from segregation and racism and toward integration and tolerance, often in the face of fierce resistance by local school boards.

Here, local school boards – with the support of the courts of appeals – seek voluntarily to advance the values that animated this Court's landmark decisions. Petitioners urge this Court to turn its back on well-settled constitutional principles as well as on the Court's own statements in prior opinions in order to block these school boards' efforts to maximize their students' educational experience by providing a racially diverse school environment. Because the school boards' actions are narrowly tailored to achieve a compelling government interest, and therefore satisfy strict scrutiny review, this Court should uphold their educational decisions.

To begin with, the interest advanced by the school boards in these cases – their conclusion as a matter of educational policy that the learning process is benefited significantly when students are taught in a racially diverse environment – is a compelling governmental interest. This Court recognized as much in its unanimous decision in *Swann* v. *Board of Education*, 402 U.S. 1, 16 (1971), stating that a local school board's determination "that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students re-

flecting the proportion for the district as a whole" falls "within the broad discretionary powers of school authorities." The courts of appeals have uniformly held that this interest is compelling.

The federal government has reached the same conclusion. In a long line of statutes culminating in the No Child Left Behind Act, Congress has found that "[i]t is in the best interests of the United States" to support local school boards "that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education." 20 U.S.C. § 7231(a)(4)(A). It has also established grant programs focused on assisting local school boards in that effort.

Finally, this Court endorsed the school districts' reasons for concluding that their interest is compelling, recognizing that "[a]ttending an ethnically diverse school may help accomplish th[e] goal [of enabling minority children to achieve their full measure of success] by preparing minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage." *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-473 (1982) (citations omitted). A wealth of empirical data supports this Court's conclusion. For all of these reasons, the interest advanced by the school districts here is a compelling one.

This Court's prior decisions assessing whether race-based criteria are narrowly tailored all arose in a context in which the government was making individualized decisions based on a variety of criteria. Where, as here, the government program does *not* involve this sort of individualized decisionmaking, the narrow tailoring test does not require the government to reconfigure its program and utilize individualized assessments based on multiple considerations in order to pursue a compelling interest. Rather, the narrow tailoring in-

quiry must be reframed to provide equivalent protection in this different context.

The appropriate narrow tailoring standard requires a showing that race is not used unnecessarily to accomplish the compelling governmental interest. This inquiry encompasses assessment of serious, good-faith consideration of race-neutral alternatives, and the absence of quotas and undue harm to any racial group, as well as consideration of the extent to which the school board's approach uses factors other than race in the pupil allocation process.

In applying this standard, the Court should follow its long-established practice, applied in a wide variety of constitutional contexts, of configuring the requirements of the Constitution to reflect the deference accorded to educators' decisions in the K-12 context. This deference should apply to both of the decisions that underlie a school board's implementation of its educational goal of teaching schoolchildren in a diverse environment: first, that the local board has a compelling interest in providing a diverse education environment; and, second, that the means employed by the local school board are narrowly tailored toward achieving that end. Measured against that standard, the voluntary plans at issue here should be upheld by this Court.

ARGUMENT

THE CONSTITUTION PERMITS LOCAL SCHOOL BOARDS VOLUNTARILY TO ADOPT NARROWLY TAILORED MEASURES TO DESEGREGATE OR PREVENT RESEGREGATION OF PUBLIC SCHOOLS.

A. Educating Children In A Racially Diverse Environment Is A Compelling Governmental Interest.

Petitioners and their amici seek to collapse the two separate inquiries under strict scrutiny analysis. Their argument that respondents have failed to demonstrate a compelling in-

terest is based upon their assertion that the only legitimate method of promoting the interest in providing education in a racially diverse environment is by individualized determinations based on a range of factors. Because respondents did not make individualized determinations, they assertedly cannot be seeking to promote diversity.

That contention confuses goals and means. The goal of educating schoolchildren in a racially diverse environment may be achieved through a variety of means. Individualized determinations may be one way, but – as these cases demonstrate – it is not the only way. The compelling-interest test asks whether the goal is sufficiently important; the narrow tailoring inquiry asks whether the means are permissible.

The desire of petitioners and their amici to lump the two inquiries together is understandable: they have no grounds for disputing the conclusion of the courts below that a local school district has a compelling interest in educating its schoolchildren in a racially diverse environment. This Court, the courts of appeals, and Congress all have endorsed that conclusion.[3]

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[3] The dissenters below in the *Seattle* case advanced a similar argument, contending (05-908 Pet. App. 84a-86a) that promoting diversity between white and nonwhite students can never be a compelling interest: a school district must choose between promoting diversity on the full range of racial and ethnic bases or not promoting diversity at all. See also 05-908 U.S. Am Br. 13-14. There is no basis in this Court's precedents for such an assertion. To the contrary, this Court's decisions in the desegregation context focused on the very same criteria. Moreover, as we discuss in detail below, this Court and Congress have focused specifically on the importance of racial diversity in the K-12 context and the empirical data support that conclusion. Given our Nation's three-hundred year history of specific, targeted discrimination against African-Americans, and the documented residual effects of that conduct, it would be extraordinary for this Court to hold it impermissible for a school board to conclude that there is a compelling

1. This Court Has Recognized A Compelling State Interest In Providing Schoolchildren With A Diverse Educational Environment, And The Courts Of Appeals Unanimously Agree.

In *Swann* v. *Board of Education*, 402 U.S. 1 (1971), a unanimous Court, speaking through Chief Justice Burger, clearly distinguished between the power of a local school board to implement race-conscious pupil assignment policies and the more limited authority of a court to order adoption of such rules:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Id. at 16; *see also McDaniel* v. *Barresi*, 402 U.S. 39 (1971) (upholding school board's voluntary adoption of race-conscious pupil assignment standards without finding of de jure segregation); *Bustop, Inc.* v. *Bd. of Educ.*, 439 U.S. 1380, 1383 (1978) (Rehnquist, J., in chambers) (petitioner sought stay of implementation of desegregation plan on ground that the federal Constitution barred race-conscious student busing unless required to remedy violations of the Fourteenth Amendment; stay denied on ground that there was "very little doubt" that the Constitution permitted the plan's

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educational interest in providing a racially diverse school environment. Accord *Comfort* v. *Lynn Sch. Comm.*, 418 F.3d 1, 17-18 (1st Cir.), cert. denied, 126 S. Ct. 798 (2005).

implementation notwithstanding the absence of a constitutional violation).[4]

For nearly three decades, the courts of appeals have consistently adhered to the distinction drawn by the *Swann* Court, holding in a variety of contexts that fostering a racially diverse educational environment is a compelling governmental interest that may justify use of race-conscious measures as one element of a pupil assignment plan. Thus, in *Johnson* v. *Board of Education*, 604 F.2d 504 (7th Cir. 1979), the court upheld a desegregation plan adopted voluntarily by the Chicago School Board. It found that "the state interest in promoting integration in these two high schools and communities, while at the same time affording all students residing in these attendance areas a viable opportunity to attend high school in an integrated setting, to be compelling." *Id.* at 516; accord *Parent Ass'n of Andrew Jackson High Sch.* v. *Ambach*, 598 F.2d 705, 718-719 (2d Cir. 1979) (upholding race-conscious plan designed to prevent resegregation).

The court in *Spangler* v. *Pasadena City Board of Education*, 611 F.2d 1239 (9th Cir. 1979), specifically relied upon

[4] Justice Powell reached the same conclusion in his separate opinion in *Keyes* v. *School District No. 1*, 413 U.S. 189, 242 (1973), stating that "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation. In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors. Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience." Accord *Seattle Sch. Dist. No. 1*, 458 U.S. at 501 n.17 (Powell, J., dissenting) (indicating that "[a]s a former school board member for many years" he would "[a]s a policy matter" leave in place a school board's decision to experiment with a voluntary student busing program).

the school board's "representations that it would continue to engage in affirmative action in the future in support of integration" in directing the district court to terminate the injunction in effect in that case. *Id.* at 1241; see also *id.* at 1245 (Kennedy, J., concurring) (citing school board's "official resolution promising * * * to adopt and maintain 'affirmative action programs designed to improve racial integration among students, faculty and administrative staff of the District'").

Most recently, in addition to the decisions below (see 05-908 Pet. App. 22a-33a & 05-915 Pet. App. C43-C54), the First Circuit in *Lynn*, 418 F.3d at 16, held that "there are significant educational benefits to be derived from a racially diverse student body in the K-12 context. [The school district] has a compelling interest in obtaining those benefits." Accord *Brewer* v. *West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000).

Petitioners and their amici have not identified a single decision of this Court or the courts of appeals that reaches a contrary conclusion. The Court should reject petitioners' invitation to effect a radical change in the law by overturning the distinction drawn by the Court in *Swann* and relied upon repeatedly by the lower federal courts. Moreover, as we next discuss, petitioners' approach would lead to absurd results.

2. Petitioners' Argument Leads To The Absurd Result That A School Board That Wishes To Retain Some Or All Of The Race-Based Measures Used To Achieve Unitary Status May Do So Only If It Remains Under Federal Court Supervision.

When a school board is found to have engaged in de jure segregation, this Court's decisions direct the district court to require the board "to 'take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" *Freeman* v. *Pitts*, 503

U.S. 467, 486 (1992) (quoting *Green* v. *School Bd.*, 391 U.S. 430, 437-438 (1968)). "The concept of unitariness has been a helpful one in defining the scope of the district courts' authority, for it conveys the central idea that a school district that was once a dual system must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn." *Id.* at 486.

In *Board of Education* v. *Dowell*, 498 U.S. 237 (1991), the Court held that motions to lift or modify school desegregation injunctions should not be assessed against the stringent "grievous wrong" standard set forth in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). The Court emphasized that "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." 498 U.S. at 248. "Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.'" *Ibid.* (citation omitted).

One year later, in *Freeman*, *supra*, the Court made clear that "in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages." 503 U.S. at 490. That holding rested in large part upon the Court's long-established view that "'local autonomy of school districts is a vital national tradition'" and its conclusion that "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." *Ibid.* (citation omitted).

Petitioners' contention that voluntary race-conscious measures are *never* permissible is flatly inconsistent with this Court's recognition of the extraordinarily strong interest in local control of education. Under petitioners' view of the law, a school district that adopted race-conscious measures in order to achieve unitary status must immediately eliminate all such measures the instant that the district is granted unitary status.

As the Louisville case demonstrates, however, a school district may wish to retain some or all of the measures that it originally implemented in order to eliminate the vestiges of desegregation. See 05-915 Pet. App. C14-C17. The district may find a valuable pedagogical effect in educating children in schools with diverse populations and determine that elimination of the measures will lead to resegregation; and it may believe that abrupt elimination of some or all of the measures would disrupt a well-functioning school system – because of the sudden cessation of accepted practices, because of the controversy that might be generated by elimination of those practices, or both.

Under petitioners' view, the only way such a school district may avoid the adverse effects on its students' education that would flow from elimination of the race-conscious measures would be to choose to remain under court supervision, with all of the attendant lack of control, expense, and lack of flexibility. That result is wholly inconsistent with this Court's long-established emphasis on local control. It also makes no sense: there is no basis for interpreting the Constitution to impose such a straitjacket on local school boards.

The situation is even more absurd for districts never found to have engaged in de jure segregation. Rather than allowing these school districts to act voluntarily to eliminate segregation without the need for an expensive and time-consuming judicial inquiry into whether the segregation is de jure or de facto, petitioners would require a court determina-

tion in every single case. (As the court of appeals observed in the Seattle case (05-908 Pet. App. 5a-6a), the Seattle plan was adopted initially at least in part because the local school board's voluntary action avoided a Department of Education investigation and threatened desegregation lawsuit.) A school district could not implement *any* race-based measure voluntarily – no matter how limited the use of racial criteria – in the absence of a court decree. That is true whether the school district sought to implement the measure for the pedagogical benefits that flow from educating children in schools with diverse populations, to avoid time-consuming, divisive, and expensive litigation and retain control over educational policy in its schools, or both.

Nothing in this Court's cases requires these results. Indeed, the Court can prevent them simply by reaffirming *Swann*'s recognition that educating children in a racially diverse environment constitutes a compelling state interest.

3. Congress Has Long Recognized The Compelling Interest In Educating Children In Desegregated Schools.

The compelling interest in educating children in racially diverse schools also has long been recognized by Congress. The relevant statutory provisions were enacted most recently in the portion of the recently enacted No Child Left Behind Act providing for federal assistance to magnet schools. The statute states:

> It is in the best interests of the United States—
>
> (A) to continue the Federal Government's support of * * * local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education;
>
> (B) to ensure that all students have equitable access to a high quality education that will prepare all

> students to function well in a * * * highly competitive economy comprised of people from many different racial and ethnic backgrounds; and
>
> (C) to continue to desegregate and diversify schools by supporting magnet schools, recognizing that segregation exists between minority and non-minority students as well as among students of different minority groups.

20 U.S.C. § 7231(a)(4); see also *id.* § 7231(b) (stating that the "purpose" of federal aid to magnet schools is "to assist in the desegregation of schools served by local educational agencies" by providing financial assistance for, among other goals, "the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students").

Moreover, the statute makes clear that federal grants may be awarded to local educational agencies either that are under judicial or administrative order to desegregate elementary or secondary schools *or* that have adopted a voluntary plan found adequate by the Secretary of Education "for the desegregation of minority-group-segregated children or faculty in such schools." *Id.* § 7231c(2). An application for federal funds must describe how the requested grant "will be used to promote desegregation, including how the proposed magnet school programs will increase interaction among students of different social, economic, ethnic, and racial backgrounds." *Id.* § 7231d(b)(1)(A). Finally, the Secretary of Education's evaluations of local school districts' magnet school programs must address "the extent to which magnet school programs lead to the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students." *Id.* § 7231i(b)(3).

These provisions of the No Child Left Behind Act, which have their roots in the Emergency School Aid Act of

1972[5] and subsequent measures,[6] clearly reflect Congress's determination that there is a compelling governmental interest in educating schoolchildren in a racially diverse environment. It provides very substantial support for reaffirming this Court's statement in *Swann*.[7]

The government does not even attempt to explain how its position that there is no compelling interest in a racially diverse educational environment is consistent with the very clear provisions of this federal statute. Indeed, it expressly recognizes that the Department of Education has by regulation "identified the goal of 'reducing, eliminating or preventing minority group isolation' through magnet schools as a

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[5] Pub. L. No. 92-318, Title VII, §§ 701-720, 86 Stat. 354.

[6] The bipartisan congressional support for federal financial assistance to foster voluntary desegregation has remained consistent over the more than thirty years since the program was created. Concerned about insufficient support for voluntary desegregation after the program had been merged into a block grant program, Congress in 1984 enacted the Magnet Schools Assistance Program, Pub. L. No. 98-377, 98 Stat. 1299, again stressing its goal of promoting voluntary desegregation to improve student achievement through the reduction of racial isolation in elementary and secondary schools.

[7] The Executive Branch first recognized the compelling nature of this interest in 1970 when President Nixon proposed what became the Emergency School Aid Act. He stated that "[i]t is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education—not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broadbased human understanding that increasingly is essential in today's world." H.R. Rep. No. 92-576 (1971), at 3. President Nixon concluded that "doing a better job of overcoming the adverse educational effects of racial isolation, wherever it exists, benefits not only the community but the nation." *Id.* at 6.

'compelling interest.'" 05-908 U.S. Br. 26. The statement that the Department of Education "expressly favor[s] race-neutral" alternatives to achieving this goal relates to means, and does not in any way undercut its recognition that the goal is a compelling one. Rather, by incorporating the statutory purpose of eliminating minority group isolation, the regulation further demonstrates the compelling interest in achieving that goal.

4. *Desegregation Of Elementary And Secondary Schools Serves The Compelling National Interest In Fostering National Unity And Effective Participation Of All Citizens In The Civic Life Of The Nation As Well As Preparing Schoolchildren To Participate In Today's Diverse Business Environment.*

This Court has already explained why local school boards have a compelling interest in providing a racially diverse educational environment:

> Education has come to be 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.' When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in – and are fully accepted by – the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage.

Seattle Sch. Dist. No. 1, 458 U.S. at 472-473 (citations omitted); accord *Grutter* v. *Bollinger*, 539 U.S. 306, 330-332

(2003); *id.* at 387-388 (Kennedy, J., dissenting) ("[o]ur precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence").

Expert educators agree. Charles Silberman has observed:

> The way we do things * * * shapes values more directly and more effectively than the way we talk about them. Certainly administrative procedures like * * * racial segregation * * * affect "citizenship" education more profoundly than does the social studies curriculum. And children are taught a host of lessons about values, ethics, morality, character and conduct every day of the week, less by the content of the curriculum that by the way schools are organized, the way teachers behave, they way they talk to children and to each other.

CHARLES E. SILBERMAN, CRISIS IN THE CLASSROOM 9 (1971).

This Court's conclusion in *Seattle School District No. 1* about the important effects of a diverse educational environment is also supported by a wealth of research focused specifically on the positive effects of racially diverse K-12 schools on the educational experience of students attending those schools.

To begin with, a significant body of empirical research confirms this Court's conclusion that education in a racially diverse environment best prepares all students to participate fully in our diverse Nation. One recent study concluded that "the vast majority of graduates * * * found [the daily cross-racial interaction in high school] to be one of the most meaningful experiences of their lives, the best—and sometimes the only—opportunity to meet and interact regularly with people of different backgrounds." Amy Stuart Wells *et al.*, *How Desegregation Changed Us: The Effects of Racially Mixed*

Schools on Students and Society 6 (Apr. 2004), available at http://cms.tc.columbia.edu/i/a/782_ASWells041504.pdf.

Numerous studies establish the positive results of desegregation in fostering the participation and inclusion of African Americans in American society:

> The evidence from extensive survey data supports a conclusion that desegregated schooling has important long-term benefits for minority students, especially in terms of its ability to open up economic opportunities for them. * * * Parents who have attended desegregated schools are more likely to have attended college, have better jobs, and live in desegregated neighborhoods. They are also more likely to provide their children with the skills they need to begin school.

William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. NEGRO EDUC. 255 (1997).[8]

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[8] Other studies similarly document the impact of school desegregation in several areas including desegregation of the work force, attendance at desegregated colleges, choices to live in desegregated neighborhoods and the development of cross-racial friendships. See Jomills Henry Braddock II & Marvin P. Dawkins, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394 (1994); Jomills Henry Braddock II & James M. McPartland, *The Social and Academic Consequences of School Desegregation*, in EQUITY & CHOICES (1988); Jomills Henry Braddock II, Marvin P. Dawkins & William T. Trent, *The Effects of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT'L J. CONTEMP. SOC. 273 (1994); Maureen T. Hallinan & Stevens S. Smith, *The Effects of Classroom Racial Composition on Students' Interracial Friendliness*, 48 SOC. PSYCHOL. Q. 3 (1985); Michal Kurlaender & John Yun, *Is Diversity a Compelling Educational Interest? Evidence from Metropolitan Louisville*, in DIVERSITY CHALLENGED:

Finally, a very substantial body of research establishes a link between desegregation at the K-12 level and improvements in the academic achievement of minority children. See, *e.g*, EFFECTIVE SCHOOL DESEGREGATION: EQUALITY, QUALITY AND FEASIBILITY (W.D. Hawley ed. 1981) (including a meta-analysis of 93 studies conducted by Robert L. Crain and Rita E. Mahard on the effect of desegregation); Eric A. Hanushek, John F. Kain, & Steven G. Rivkin, *New Evidence About Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement*, Nat'l Bureau on Econ. Res., Working Paper No. 8741 (2002).[9]

The gap between white and black students in reading was narrowed significantly in the 1970s and early 1980s as measured by the widely respected National Assessment of Educational Progress. The greatest gains were recorded by black elementary students in the Southeast during the 1970s, when school desegregation was occurring across the region

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EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Orfield & Kurlaender eds. 2001); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531 (1994); Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 99 (Orfield & Kurlaender eds. 2001).

[9] Numerous studies also show that school desegregation has little or no measurable negative impact on white students. Gary Orfield & Chung Mei Lee, *Racial Transformation and the Changing Nature of Segregation*, Harvard Civil Rights Project (2006), available at http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf. Nor do whites gain if schools become resegregated after the end of a desegregation plan. Catherine Horn & Michal Kurlaender, *The End of* Keyes*—Resegregation Trends and Public Schools*, Harvard Civil Rights Project (2006), available at http://www.piton.org/Admin/Article/Full%20Harvard%20study-%20part%202.pdf.

after *Swann*. See Marshall S. Smith & Jennifer O'Day, *Educational Equality: 1966 and Now*, in SPHERES OF JUSTICE IN EDUCATION: THE 1990 AMERICAN EDUCATION FINANCE YEARBOOK 53, 80 (Verstegen & Ward eds. 1991); NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, THREE NATIONAL ASSESSMENTS OF READING CHANGES IN PERFORMANCE, 1970-1980, at 42-44 (1981).

While many of these changes were prompted by court-ordered desegregation, studies have shown that the *positive impact of desegregation on achievement is stronger when desegregation is voluntary*. See THOMAS COOK ET AL., SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT (1984); WALTER G. STEPHAN, BLACKS AND BROWNS: THE EFFECTS OF SCHOOL DESEGREGATION ON BLACK STUDENTS (1984).

Positive changes have taken place in educational attainment as well as in achievement scores. In St. Louis, African American students enrolled in voluntary desegregation programs in the suburbs graduate from high schools at more than twice the rate of their city peers. This is so even though a high proportion of these transferring students come from poor families. AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS 182 (1997). See also Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 796-97 (2005).

In sum, overwhelming empirical evidence supports this Court's recognition that there is a compelling governmental interest in educating schoolchildren in a racially diverse environment.

B. The Challenged Voluntary Measures Are Narrowly Tailored To Achieve This Compelling Interest.

The legal issue before the Court in this case is fundamentally different from those considered in this Court's prior

cases addressing race-conscious government action. As Judge Kozinski explained in his concurring opinion below:

> The Seattle plan * * * is not meant to oppress minorities, nor does it have that effect. No race is turned away from government service or services. The plan does not segregate the races; to the contrary, it seeks to promote integration. There is no attempt to give members of particular races political power based on skin color. There is no competition between the races, and no race is given a preference over another. That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability. The program does use race as a criterion, but only to ensure that the population of each public school roughly reflects the city's racial composition.

05-908 Pet. App. 65a. Chief Judge Boudin reached precisely the same conclusion in his concurring opinion upholding a similar plan adopted voluntarily by a local school board to promote a diverse educational environment. *Lynn*, 418 F.3d at 27.

Judge Kozinski concluded that these distinctions warrant application of the rational-basis standard of review. 05-908 Pet. App. 65a-66a. This Court need not reach that conclusion to uphold the local school board decisions at issue in these cases. Even under strict scrutiny, the narrow-tailoring standard must be applied in a manner that takes account of the very different nature of the government action challenged here and of the Court's long-standing deference to the decisions of local school boards. The arguments to the contrary by petitioners and their amici resound with "the thud of square pegs being pounded into round holes." *Id.* at 63a (Kozinski, J., concurring). Assessed against the proper stan-

dard, it is clear that the actions of the local school boards should be upheld.

1. Individual Holistic Assessments Are Not Required Or Even Appropriate To Satisfy Narrow Tailoring In The K-12 Context; A Local School Board Must Prove That Race Is Not Used Unnecessarily In The Government Decisionmaking.

Petitioners and their amici reflexively invoke the narrow-tailoring standard applied by the Court in *Grutter*, seizing in particular on the absence here of individualized holistic consideration of the qualifications of each student. But *Grutter* itself recognized that the narrow-tailoring standard must be "calibrated to fit the distinct issues raised" and take "'relevant differences into account.'" 539 U.S. at 334 (citation omitted). The particulars of the standard applied there are not appropriate for this very different context.

The government action challenged in *Grutter* involved allocation of places in an elite educational institution on the basis of individualized assessment of a student's qualifications based on a variety of considerations. When the government's decisionmaking process turns upon individualized assessment, the compelling interest must be "achieved by a system where individual assessment is safeguarded through the entire process. * * * [A]n educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking." 539 U.S. at 392-93 (Kennedy, J., dissenting).

Where, as here, the government program does *not* involve this sort of individualized decisionmaking, the narrow-tailoring test does not require the government to reconfigure its program and utilize individualized assessments based on multiple considerations in order to pursue a compelling inter-

est. Rather, the narrow-tailoring inquiry must be reframed to provide equivalent protection in this different context.

Any other approach would be nonsensical. After all, the process for allocating students among a school district's primary and secondary schools is totally different from the process for selecting students for an elite undergraduate or graduate institution (or a selective-admission secondary school). A school board must find a place for every student living within its district: "school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend." *Bazemore* v. *Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring). The assignment process involves allocation of students among substantially similar schools; denying admission is not an option. Cf. *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 301 n.39 (1978) (Powell, J.) (observing that the University "did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education").

School boards consequently do not assess every kindergarten or fifth or ninth grade student individually based on a number of different parameters. Such a process would be impossibly burdensome as well as unnecessary. Rather, local school boards establish broad standards to allocate students among their schools. There simply is no basis for requiring a school board to jettison its normal approach to pupil assignment simply because it voluntarily seeks to achieve a racially diverse environment.

The question, therefore, is how the narrow-tailoring standard should apply to government decisions that are not made on an individualized basis. The essential goal of the narrow-tailoring test is to "ensure[] that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial

prejudice or stereotype." *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

We submit that the appropriate standard in this context is one that requires a showing that race is not used unnecessarily to accomplish the compelling governmental interest. This inquiry, which parallels the standard identified by Justice Kennedy in his opinion in *Grutter*, encompasses *Grutter*'s assessment of serious, good-faith consideration of race-neutral alternatives, and the absence of quotas and undue harm to any racial group, as well as consideration of the extent to which the school board's approach uses factors other than race in the pupil allocation process. Cf. *United States* v. *Paradise*, 480 U.S. 149, 187 (1987) (Powell, J., concurring). As we next discuss, when applied in the K-12 context this standard also must reflect the deference this Court traditionally accords to local school boards' educational decisions.[10]

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[10] Adoption of this approach by the Court is especially important because local school boards make a number of other non-individualized educational determinations that might be the target of lawsuits similar to those now before the Court. For example, the district court in the Louisville case observed that in that district "[r]acial demographics have influenced the boundaries for contiguous and non-contiguous resides areas and the composition of some elementary school clusters. Elementary schools are clustered so that combined attendance zones, assuming normal voluntary choices, will produce at each school student populations somewhere within the racial guidelines." 05-915 Pet. App. C19.

Under petitioners' theory, any such zoning decision would be unconstitutional automatically because it involved consideration of race. So would decisions regarding the location of magnet programs – which often turn on the racial make-up of the area surrounding a school (and the interest in attracting students from other neighborhoods in order to promote diversity) – as well as school siting decisions that took account of the race of students residing nearby. Judicial second-guessing of school board decisions would skyrocket under the legal regime advocated by petitioner.

2. *The Narrow-Tailoring Test Must Be Applied In A Manner That Preserves The Discretion This Court Affords To Local School Authorities In Implementing Educational Goals.*

This Court has long recognized that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. * * * By and large, public education in our Nation is committed to the control of state and local authorities." *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975); accord *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988); *Milliken* v. *Bradley*, 418 U.S. 717, 741 (1974); *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 42-43, 49 (1973).

The Court has applied this well-settled principle in a wide variety of constitutional contexts, configuring the requirements of the Constitution to reflect the deference accorded to educators' decisions in the K-12 context. See, *e.g.*, *Vernonia Sch. Dist. No. 47J* v. *Acton*, 515 U.S. 646, 665 (1995) (upholding random drug testing in K-12 schools); *Kuhlmeier*, 484 U.S. at 267-268 & 270-274 (deferring to educators' judgments in First Amendment context); *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 683 (1986) ("[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board"); *N.J.* v. *T.L.O.*, 469 U.S. 325 (1985) (Fourth Amendment); *Lopez*, *supra* (due process).

In applying the compelling-interest test in the K-12 context, it is similarly appropriate to accord deference to the determinations by a local school board that underlie implementation of its educational goal of teaching schoolchildren in a diverse environment: first, that the local board has a compelling interest in providing a diverse education environment; and, second, that the means employed by the

local school board are narrowly tailored toward achieving that end.

With respect to the first determination, there is – as we have discussed (see pages 4-18, *supra*) – substantial authority recognizing the very significant benefits to all students, majority and minority, that flow from a racially diverse K-12 education. Indeed, both Congress and this Court have specifically endorsed that goal.

Just as there is no doubt about the broad authority of local officials, along with the state, to establish the curriculum for their students, it is well within the province of state and local educators to determine the optimal educational environment for their schools and classrooms and the educational values they wish to promote. As the Court – speaking through Justice Powell – observed in *Rodriguez*,

> [T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

411 U.S. at 42-43.

For similar reasons, deference also is appropriate as to a local school board's voluntary decision that race-conscious measures are necessary to achieve its goal. Allocating students among a district's schools – like drawing the lines for legislative districts – is a complicated process involving a number of variables. These include taking into account time and distance from home to school, according a measure of choice to students with special interests, accommodating desires to have siblings attend the same schools, and providing accessible education for students with special needs. The narrow-tailoring standard should take account of the special expertise of local school boards in determining the most

appropriate method for allocating their schoolchildren among the particular district's schools.

Indeed, the Court has done just that in the context of desegregation decrees, making clear that "[r]emedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary." *Swann*, 402 U.S. at 16. Rather, the local school board must exercise its discretion to come forward with a plan that satisfies the compelling interest in eradicating de jure segregation and its vestiges. So too here, the standard should be whether the school district has devised a pupil allocation plan that is tailored to achieving its compelling interest without using race unnecessarily to accomplish its goal of providing a diverse educational environment. See also 05-915 Pet. App. C42 ("[i]t would seem rather odd [if] the concepts of equal protection, local control, and limited deference [were] now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law") (footnote omitted).

3. The Seattle Provisions.

The Seattle Board's statement makes clear that the plan challenged here was adopted in order to further the compelling interest in obtaining for the district's students the educational benefits of learning in a racially diverse environment. 05-908 Pet. App. 20a-21a. For the reasons we have discussed, that interest is sufficient to satisfy strict scrutiny.[11]

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[11] Petitioners and their amici rather disingenuously challenge the legitimacy of Seattle's interest on the ground that the particulars of Seattle's plan supposedly are inconsistent with the District's educational goals. They argue that the plan is underinclusive (because it leaves in place substantially nondiverse schools in the absence of oversubscription by ninth graders) and overinclusive (because it applies to schools at which there would be some diversity in any event). They also contend that Seattle should have identified the particular level of diversity necessary to satisfy its educational ob-

The particulars of Seattle's plan are narrowly tailored to this interest. The plan applies to the allocation of ninth graders among the District's high schools. A student may select any of the ten high schools in the District as his or her first choice. Unless that school is oversubscribed, the student will be admitted to it. If a particular school is oversubscribed, then the District will allocate students based on a series of tiebreakers:

- First, students who have a sibling attending the school will be admitted.
- Second, if "the racial make up of [a high school's] student body differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole" even after the sibling preference is applied, then the race of the student is considered. 05-908 Pet. App. 10a. This tiebreaker "is applied to the entering ninth grade population only until it comes within the 15 percent plus or minus variance. Once that point is reached, the District 'turns off' the race-based tiebreaker and there is no further consideration of a student's race in the assignment process." *Id.* at 12a.
- Third, students are admitted according to the distance between their home and the high school.
- Fourth, a lottery is used to allocate the remaining seats.

Assessed in light of the deference that this Court accords to educational decisions by local school authorities, Seattle's

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jectives. Of course, if the plan contained these more intrusive and more specific racial criteria, petitioners then would cite each of those details in arguing that the plan's specificity constituted an impermissible quota. The school board legitimately exercised its discretion to craft a plan that satisfies its educational goals as well as this Court's narrow-tailoring criteria.

limited use of a race-conscious measure plainly is not unnecessary to achieving the compelling interest.

Consideration of race-neutral alternatives. The court below thoroughly discussed the District's evaluation of alternative approaches and correctly concluded that "the District made a good faith effort to consider feasible race-neutral alternatives and permissibly rejected them in favor of a system involving a sibling preference, a race-based tiebreaker, and a proximity preference." 05-908 Pet. App. 57a-58a. Given the deference accorded to a local school board's educational judgments, Seattle was not required to do more.

Absence of quotas. Seattle's plan does not set aside a fixed number of places in any school for white students or for nonwhite students. If no school is oversubscribed, then the tiebreakers do not operate: a school could be composed of all white students or all nonwhite students.[12] And even if the tiebreaker does come into play, it "is used only so long as there are members of the underrepresented race in the applicant pool for a particular oversubscribed school. If the number of students of that race who have applied to that school is exhausted, no further action is taken, even if the 15 percent has not been satisfied." *Id.* at 44a.

The actual operation of the plan confirms the absence of any fixed quota. For the 2001-02 school year, the race-based tiebreaker was not used for assignments to seven of the District's ten high schools because those schools were not oversubscribed. In the prior year, when the race-based provisions of the plan were more substantial, it affected the assignment of only ten percent of the District's ninth graders. *Id.* at 11a, 12a.

Certainly the fact that the plan is triggered by a more-than-fifteen-percent variance from the District's racial

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[12] Indeed, two of Seattle's high schools are more than ninety percent nonwhite. 05-908 Pet. App. 197a.

makeup does not mean that it constitutes a quota. The tiebreaker may not be triggered for any school; and even if it is triggered, it allows a thirty percentage point variation in a school's racial makeup. Compare *Grutter*, 539 U.S. at 389-90 (Kennedy, J., dissenting) (criticizing extremely low variation in percentage of minorities enrolled in the law school). And because the tiebreaker only operates as long as there are members of the underrepresented race in the applicant pool, the actual variance can be even greater. There simply is no basis for condemning this flexible plan as a rigid quota.

Absence of undue harm. Seattle's plan does not single out any particular racial group. The record demonstrates that substantial numbers of both white and nonwhite students were assigned to their first choice schools as a result of the operation of the tiebreaker. 05-908 Pet. App. 60a. The benefits and burdens of the plan are thus shared by students of all races.[13]

Relative prominence of race-based criteria in pupil assignment plan. Seattle has carefully designed its plan so that the use of the race-based criterion is a subsidiary part of the pupil assignment process. The criterion only comes into play if a school is oversubscribed, and even then it is limited by the broad (thirty percentage point) range that is permissible under the plan as well as by the number of applicants from the underrepresented category. The use of race is focused and

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[13] Petitioners and their amici argue that the plan imposes undue harm because some students necessarily are denied the school of their choice solely because of their race. If that were a legitimate objection, then the use of race-based criteria would never be constitutionally permissible: the only reason a constitutional question arises in the first place is because some students are adversely affected because of their race. Without that adverse impact, no one would have standing to challenge Seattle's plan. The undue-burden inquiry focuses on whether there is a disproportionate burden, not whether there is any burden.

moderate. Indeed, under the more stringent version of the plan in effect in 2000-01 only ten percent of the District's ninth graders were assigned on the basis of this criterion. *Id.* at 12a. The percentage necessarily would be lower based upon the current version of Seattle's plan. The District's plan satisfies the narrow-tailoring test.

4. The Louisville Provisions.

The Louisville plan was adopted following the dissolution of the 1975 desegregation decree, which had included a number of race-based student assignment criteria. The plan "requires each school to seek a Black student enrollment of at least 15% and no more than 50%. This reflects a broad range equally above and below Black student enrollment systemwide," which is approximately 34%. 05-915 Pet. App. C17-C18, C11. Normally, elementary school students are assigned to their local school ("resides school" in the plan's terminology) "unless that school exceeds its capacity or hovers at the extreme ends of the racial guidelines" or the student has applied to and been accepted by another school, such as a magnet school. *Id.* at C24. Middle school and high school students may attend their resides school, to which they are entitled to be admitted, or apply to a magnet school, magnet program, or optional program. Admission to magnet schools and similar programs generally is based upon objective criteria, available space, and the racial guidelines (one school also uses the student's residence to obtain a student body representative of the county). *Id.* at C25-C27.

This plan, like Seattle's, is based upon the school board's determination that students gain substantial educational benefits from learning in a racially diverse environment. *Id.* at C46-C47 & C49-C51. The district court, which had overseen the school board's compliance with the 1975 decree, concluded that the policy "is sincerely held and not intended to disadvantage any race" and correctly determined that the

board had met its burden of establishing a compelling interest. *Id.* at C53 (footnote omitted).

The discussion of narrow tailoring with respect to the Seattle plan also demonstrates why the Louisville plan should be upheld. Here too, the school board considered a variety of race-neutral options (*id.* at C68-C69); there are no quotas – the plan does not reserve a pre-set number of places for students of a particular race, and the wide variance among the percentages of African-American students in the district's schools (ranging from 20.1% to 50.4%) confirms that fact (*id.* at C57-C58); and there is no undue burden because to the extent the plan confers benefits or imposes burdens they are distributed to students of all races (*id.* at C66-C67). In addition, as with the Seattle plan, race is not the principle criterion for assignment of students – student choice and, for the magnet schools, other individualized criteria are far more important. *Id.* at C62-C63. Especially given the deference accorded to a school board's educational determinations, the courts below properly upheld this plan.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

The following organizations are members of the Leadership Conference on Civil Rights:

A. Philip Randolph Institute
AARP
ADA Watch
Advancement Project
African Methodist Episcopal Church
African Methodist Episcopal Zion Church
Alaska Federation of Natives
Alaska Inter-Tribal Council
Alliance for Retired Americans
Alpha Kappa Alpha Sorority, Inc.
Alpha Phi Alpha Fraternity, Inc.
American Association for Affirmative Action
American Association of People with Disabilities
American Association of University Women
American Baptist Churches, U.S.A.-National Ministries
American Civil Liberties Union
American Council of the Blind
American Ethical Union
American Federation of Government Employees
American Federation of Labor- Congress of Industrial Organizations
American Federation of State, County & Municipal Employees, AFL-CIO
American Federation of Teachers, AFL-CIO
American Friends Service Committee
American Jewish Committee
American Jewish Congress
American Nurses Association
American Postal Workers Union, AFL-CIO
American Society for Public Administration
American Speech-Language-Hearing Association
American-Arab Anti-Discrimination Committee
Americans for Democratic Action

Anti-Defamation League
Appleseed
Asian American Justice Center
Asian Pacific American Labor Alliance
Associated Actors and Artistes of America, AFL-CIO
Association for Education and Rehabilitation of the Blind and Visually Impaired
B'nai B'rith International
Brennan Center for Justice at New York University School of Law
Building & Construction Trades Department, AFL-CIO
Catholic Charities, USA
Center for Community Change
Center for Voting and Democracy
Center for Women Policy Studies
Children's Defense Fund
Church of the Brethren-World Ministries Commission
Church Women United
Coalition of Black Trade Unionists
Common Cause
Communications Workers of America
Community Transportation Association of America
Congress of National Black Churches
Delta Sigma Theta Sorority
Disability Rights Education and Defense Fund
Division of Homeland Ministries-Christian Church (Disciples of Christ)
Epilepsy Foundation of America
Episcopal Church-Public Affairs Office
Evangelical Lutheran Church in America
Families USA
Federally Employed Women
Feminist Majority
Friends Committee on National Legislation
Global Rights: Partners for Justice
GMP International Union

Hadassah, The Women's Zionist Organization of America
Hotel and Restaurant Employees and Bartenders International Union
Human Rights Campaign
Human Rights First
Improved Benevolent & Protective Order of Elks of the World
Industrial Union Department, AFL-CIO
International Association of Machinists and Aerospace Workers
International Association of Official Human Rights Agencies
International Brotherhood of Teamsters
International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO
International Union, United Automobile Workers of America
Iota Phi Lambda Sorority, Inc.
Japanese American Citizens League
Jewish Community Centers Association
Jewish Council for Public Affairs
Jewish Labor Committee
Jewish Women International
Judge David L. Bazelon Center for Mental Health Law
Kappa Alpha Psi Fraternity
Labor Council for Latin American Advancement
Lambda Legal
Lawyers' Committee for Civil Rights Under Law
League of Women Voters of the United States
Legal Momentum
Mashantucket Pequot Tribal Nation
Mexican American Legal Defense and Education Fund
Na'Amat USA
NAACP Legal Defense and Educational Fund, Inc.
National Alliance of Postal & Federal Employees

National Association for Equal Opportunity in Higher Education
National Association for the Advancement of Colored People
National Association of Colored Women's Clubs, Inc.
National Association of Community Action Agencies
National Association of Community Health Centers
National Association of Human Rights Workers
National Association of Negro Business & Professional
National Association of Neighborhoods
National Association of Protection and Advocacy Systems
National Association of Social Workers
National Bar Association
National Black Caucus of State Legislators
National Catholic Conference for Interracial Justice
National Coalition for the Homeless
National Coalition on Black Civic Participation
National Coalition to Abolish the Death Penalty
National Committee on Pay Equity
National Community Reinvestment Coalition
National Conference of Black Mayors, Inc.
National Congress of Black Women, Inc.
National Congress for Community Economic Development
National Congress for Puerto Rican Rights
National Congress of American Indians
National Council of Catholic Women
National Council of Churches of Christ in the U.S.
National Council of Jewish Women
National Council of La Raza
National Council of Negro Women
National Council on Independent Living
National Education Association
National Employment Lawyers Association
National Fair Housing Alliance

National Farmers Union
National Federation of Business and Professional Women's Clubs, Inc.
National Federation of Filipino American Associations
National Gay & Lesbian Task Force
National Health Law Program
National Institute For Employment Equity
National Korean American Service and Education Consortium, Inc. (NAKASEC)
National Lawyers Guild
National Legal Aid & Defender Association
National Low Income Housing Coalition
National Neighbors
National Office for Black Catholics
National Organization for Women
National Partnership for Women & Families
National Post Office Mail Handlers, Watchmen, Messengers & Group Leaders
National Puerto Rican Coalition
National Sorority of Phi Delta Kappa, Inc.
National Urban League
National Women's Law Center
National Women's Political Caucus
Native American Rights Fund
Newspaper Guild
Office of Communications of the United Church of Christ, Inc.
Omega Psi Phi Fraternity, Inc.
Open Society Policy Center
Organization of Chinese Americans, Inc.
PACE International Union
Parents, Families, Friends of Lesbians and Gays
People for the American Way
Phi Beta Sigma Fraternity, Inc.
Planned Parenthood Federation of America, Inc.
Poverty and Research Action Council

Presbyterian Church (USA)
Pride at Work
Progressive National Baptist Convention
Project Equality, Inc.
Puerto Rican Legal Defense and Education Fund, Inc.
Religious Action Center of Reform Judaism
Retail Wholesale & Department Store Union, AFL-CIO
Service Employees International Union
Servicemembers Legal Defense Network
Sigma Gamma Rho Sorority, Inc.
Sikh American Legal Defense and Education Fund
Southeast Asia Resource Action Center (SEARAC)
Southern Christian Leadership Conference
Southern Poverty Law Center
The Association of Junior Leagues International, Inc.
The Association of University Centers on Disabilities
The Center for Voting and Democracy
The Justice Project
The National Conference for Community and Justice
The National PTA
Union for Reform Judaism
Unitarian Universalist Association
UNITE HERE!
United Association of Journeymen & Apprentices of the Plumbing& Pipe Fitting Industry of the U.S. & Canada-AFL-CIO
United Brotherhood of Carpenters and Joiners of America
United Church of Christ-Commission for Racial Justice Now
United Farm Workers of America, AFL-CIO
United Food and Commercial Workers International Union
United Methodist Church-Board of Global Ministries Women's Division
United Mine Workers of America

United Rubber, Cork, Linoleum & Plastic Workers of America
United States Conference of Catholic Bishops
United States Students Association
United Steelworkers of America
United Synagogue of Conservative Judaism
Women of Reform Judaism
Women's American ORT
Women's International League for Peace and Freedom
Workers Defense League
Workmen's Circle
YMCA of the USA, National Board
YWCA of the USA, National Board
Zeta Phi Beta Sorority, Inc.